MOHD SHAHRIMAN MOHD KHAIRIL

v.

PUBLIC PROSECUTOR & ANOR

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[CRIMINAL APPLICATION NO: 44-1-1998]
20 APRIL 1998

ADMINISTRATIVE LAW: *Remedies - Habeas corpus - Order of residence - Section 6(1) Drug Dependants (Treatment and Rehabilitation) Act 1983 - Detention of a drug dependant at rehabilitation centre - Application for habeas corpus - Whether procedurally improper - Whether premature - Whether applicant must first apply for writ of certiorari - Drug Dependants (Treatment and Rehabilitation) Act 1983, ss. 6(1)(a), (b), 6(3), (4) & (5) - Federal Constitution, art. 5(2) - Rules of the High Court 1980, O. 53 - Courts of Judicature Act 1964, s. 25 - Criminal Procedure Code, s. 365*

CRIMINAL PROCEDURE: *Habeas corpus - Detention of drug addict - Inquiry before magistrate - Order of residence - Section 6(1) Drug Dependants (Treatment and Rehabilitation) Act 1983 - Procedural requirements - Duty of magistrate - Failure to consider elements in s. 6 (3), (4) & (5) of Act - Whether fatal - Application for habeas corpus - Whether applicant to be released forthwith - Drug Dependants (Treatment and Rehabilitation) Act 1983 ss. 6(1)(a) & (b), (3), (4) & (5) - Federal Constitution, art. 5(2) - Criminal Procedure Code, s. 365*

The applicant was held to be a drug dependant following a judicial inquiry by the learned magistrate under s. 6(1) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'), and was ordered to be placed at the rehabilitation centre for two years pursuant to s. 6(1)(a) thereof. The applicant alleged that the said detention order was tainted by illegality, and so applied for a writ of *habeas corpus* for his release. At the hearing of the writ, the respondents raised a preliminary objection contending that the applicant's action was both premature and procedurally improper. According to the respondents, the proper course of action was for the applicant to initiate for an order of *certiorari* to quash the learned magistrate's order, and only to apply for a writ *of habeas corpus* if further detained thereafter. In the event, a question was posed to the court as to whether, for this kind of cases, a writ of *certiorari* should have been applied first rather than a writ of *habeas corpus*. The facts further showed that, following the application herein, the learned magistrate, in what appeared to be an attempt to justify her acts in making the impugned

detention order, affirmed an affidavit and had it submitted to the learned judge for consideration. That being so, an additional question arose as to whether it was improper of the learned magistrate to have done so.

Held:

[1] There is no authority which says that if an order may be quashed by *certiorari*, an applicant who suffers an infringement of his fundamental liberties is debarred from applying for a writ of *habeas corpus* which may be more effective in the circumstances of the case. It follows that, if a detention is held to be not in accordance with the procedures established by law, an applicant may immediately apply for a writ *of habeas corpus* as he is entitled to be released forthwith. There is no necessity for him to pursue the line as suggested by the respondents which entails prior obtaining of leave, lodgment of the application with the Attorney General's Chambers, postponements, lengthy hearings etc. (O. 53 Rules of the High Court 1980) merely to regain his freedom.

[2] Article 5(2) of the Federal Constitution empowers a High Court judge, on hearing that a person is being unlawfully detained, to inquire into that complaint and, unless satisfied that the detention is lawful, to order him to be produced before the court and thenceforth have him released. Section 25 of the Courts of Judicature Act 1964, in addition, vests the relevant powers on the High Court to issue the writ of *habeas corpus*. To complete the chain, Chapter XXXVI of the Criminal Procedure Code lays down the procedure for the High Court to follow whenever it thinks fit to set a person free. Bearing these provisions in mind, and the fact that the Constitution takes precedence over statute laws, the court cannot but reject the preliminary objection of the respondents.

[3] Section 6 of the Act indicates that an applicant, after his arrest, must undergo certain tests for purposes of ascertaining whether he is a drug dependant or otherwise. Thereafter, the registered medical officer will issue a certificate in the form of Borang 2 and the applicant will forthwith be produced before a magistrate. The magistrate's first duty, thereupon, is to give the applicant the opportunity to make representations.

[3a] 'Representation' has not been defined by s. 6. Nonetheless, in the context of the section, the term must be wide enough as to include the right to challenge (i) the correctness of the tests which the applicant underwent; (ii) the truth of the certificate of the medical officer; (iii) the evidence pertaining to the circumstances of the case; and (iv) the report of the rehabilitation officer. Finally, it must also include the right to make submissions or appeals or put forward a case that is generally favourable to himself.

[3b] It is only after resolving the issue of representation that the learned magistrate may proceed with the inquiry. Prior to any pronouncement of any judicial decision, be it under sub-s. (1)(a) or (b) of s. 6, the learned magistrate, however, must personally undergo a subjective test of being satisfied of that choice. In the process, he must be thorough, sincere and must apply his mind carefully based on certain considerations and facts.

[3c] The factors of consideration enroute to the pronouncement of the order are inclusive of the elements provided for under sub-ss. (3), (4) and (5) of s. 6 of the Act. Thus, the magistrate must consider *inter alia*, the report of the rehabilitation officer, and secondly, the circumstances of the case, including the character, antecedents, age, health, education, and family of the applicant. Only then the magistrate is ready to decide, and pronounce the order after satisfying himself of the choice.

[4] The notes of proceedings as recorded by the learned magistrate showed that the process as adhered to by her was tainted with procedural and evidential flaws. Perusing the notes, there were doubts as to whether the applicant was accorded the opportunity to make representations. The notes were also silent as to the supply of a copy of the report of the rehabilitation officer to the applicant, despite the mandatory requirement thereof. These apart, the facts also showed that the medical certificate that was tendered was in fact a 'urine report'. Surely, there is a world of difference between a urine report and a certificate which is supposed to certify the position of the applicant. A question hence arose as to whether a certificate regarding the status of the applicant based on the urine report was not submitted in court for the perusal of the learned magistrate. Be that as it may, for flaws of this nature, the benefit of the doubt must lean in favour of the applicant.

[4a] The notes of proceedings also revealed flaws on the part of the learned magistrate in that there was (i) an unwillingness to adjust accordingly and correct the ready format when the need arose; (ii) an absence of indication whether the applicant's parents were present or not; and (iii) an absence of minutes as to whether she was 'satisfied' as required by s. 6(1)(a) and (b). These factors, coupled with the three procedural flaws, must necessarily give rise to a negative interpretation, in that the learned magistrate, in conducting the inquiry, had missed out all those legal requirements.

Obiter dictum

[1] The learned magistrate should have been more sensitive to her judicial position rather than the request of the relevant Ministry which is one of the contesting parties. The affidavit that she affirmed herein was a blatant attempt on her part to justify the weaknesses of her judicial act as reflected in her notes of proceedings. Apart from giving an impression of being partisan to one of the parties, the learned magistrate was totally insensitive to my predicament as a High Court judge who was then deliberating the matter at hand. It was quite ill advised of her to be a party to matters at hand, especially when fundamental liberties of a person was at stake. Magistrates, therefore, should be dissuaded from affirming affidavits merely for the sake of explaining away the flaws detectable in their notes of proceedings. Let the records do the talking.

[Order in terms of the application; writ of habeas corpus issued.]

Cases referred to:

Dato Menteri Othman Baginda & Anor v. Dato Ombi Syed Alwi Syed Idrus [1981] 1 MLJ 29 ***(refd)***

Datuk (Datu) Amir Kahar Tun Hj Mustapha v. Tun Mohd Said Keruak & Ors [1994] 4 CLJ 657 ***(refd)***

Datuk James Wong Kim Min; Minister Of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min [1976] 2 MLJ 245 ***(foll)***

Daud Salleh v. The Superintendent, Sembawang Drug Rehabilitation Centre [1981] 1 MLJ 191 ***(foll)***

Hari Ram Seghal v. Public Prosecutor [1981] 1 MLJ 165 ***(foll)***

Ho Kok Thin & Ors v. The Sheriff/Registrar Of The High Court Borneo & Anor [1989] 3 MLJ 181 ***(refd)***

Hoo Thian Siong v. Public Prosecutor [1988] 1 CLJ 176 ***(refd)***

Liversidge v. Sir John Anderson [1942] AC 207 ***(refd)***

Mahmod Jaudin v. Penguasa Pusat Serenti Sungai Besi Selangor & 2 Ors [1996] 3 AMR 2920 ***(refd)***

Pavone v. Public Prosecutor [1986] 1 MLJ 72 ***(refd)***

Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v. Tan Beng Sooi [1997] 2 CLJ 409 ***(refd)***

Public Prosecutor v. Koh Yoke Koon [1988] 2 MLJ 301 ***(refd)***

R v. Payne & Spillane [1971] 3 All ER 1146 ***(refd)***

Ratan Roy v. State of Bihar AIR (37) [1950] Patna 332 ***(refd)***

Re Hj Sazali Datuk Hj Noor Tahir [1992] 3 CLJ 1753/1755 ***(refd)***

Re Jayantilal AIR (36) [1949] 319 Bombay ***(refd)***

Re v. Venkataraman AIR (36) [1949] Madras 529 ***(refd)***

Royal Aquarium & Summer & Winter Garden Society, Ltd v. Parkinson [1892] 1 QB 431 ***(refd)***

Yeap Hock Seng @ Ah Seng v. Minister For Home Affairs, Malaysia & Ors [1975] 2 MLJ 279 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 14, 25
Criminal Procedure Code, s. 365
Drug Dependants (Treatment And Rehabilitation) Act 1983, ss. 2, 4(1)(b), 6(1)(a), (b), (3), (4), (5)
Evidence Act 1950, s. 121
Federal Constitution, art. 5(2)
Rules of the High Court 1980, O. 53

Other sources referred to:
Interpretation of Statutes, NS Bindra
Magistrates' Court Handbook, p 39

For the applicant - Mohan Singh; M/s Abd Gani Che Man & Co
For the respondents - Mohamad Abazafree Mohd Abbas

Reported by WA Shariff

JUDGMENT

Suriyadi Halim Omar J:

On 20 August 1997, Mohd Shahriman bin Mohd Khairil, hereinafter referred to as 'the applicant', was detained under the Drug Dependants (Treatment And Rehabilitation) Act 1983 (Act 283). This Act is thereafter referred as 'the Act'. Later after a judicial inquiry, the applicant was detained for two years at a Rehabilitation Centre to undergo treatment and rehabilitation pursuant to an order made by a magistrate.

Before the case proceeded the learned Federal Counsel posed a preliminary objection on the basis that this action was not in order as it was still at the premature stage. He canvassed that the proper course of action was for the applicant to initiate for an order of *certiorari* to quash the learned magistrate's order, and thereafter if still detained, to apply for a writ of *habeas corpus*. In the event he is released immediately after the order of *certiorari* has been put into effect the matter ends there. I have to admit that the argument ventilated by the learned Federal Counsel was highly interesting and merit some consideration on my part but at the end of the day I chose to reject that argument. That order came about as I concluded that the provisions of the Federal Constitution held sway over specific statutes or procedural rulings.

Retracing my steps regarding the overruling of the preliminary objection, at the outset I must reiterate that I did comment that I was not disposed to disagree with the suggestion that the applicant may apply for an order of *certiorari* and thereafter apply for a writ of *habeas corpus*. It was a question of which course of action was preferred by the applicant that would be more

expeditious in ensuring his immediate release in the event the impugn order was found to be unlawful. I know of no authority which says that if an order may be quashed by *certiorari*, an applicant who suffers an infringement of his fundamental liberties, is debarred from applying for a writ of *habeas corpus* which may be more effective in the circumstances of the case. I was not persuaded by the arguments of the learned Federal Counsel, as even a short period of detention can never be condoned let alone a long one if he has to submit to the laborious process of a writ of *certiorari*.

A reading of Art. 5(2) of the Federal Constitution, in which is enshrined the rights of a person not to be deprived of his life or personal liberty, save and in accordance with the law, has caused me no problems at all as it is so plain and unambiguous. A High Court Judge on hearing that a person is being unlawfully detained shall enquire into that complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and thenceforth have him released. Section 25 of the Courts of Judicature Act 1964 (Act 91) (Revised 1972) vests the relevant powers on the High Court to issue the writ of *habeas corpus*. To complete the chain, Chapter XXXVI of the Criminal Procedure Code (F.M.S. Cap. 6), lays down the procedure for the High Court to follow whenever it thinks fit to set a person free. Within this Chapter is promulgated s. 365 which similarly repeats the powers of the High Court to make the relevant orders with regard to an application of a writ of *habeas corpus.*

With such plain provisions how could I but not reject the preliminary objection of the Federal Counsel bearing in mind that the provisions of the Constitution take precedence over statute laws. In the case of *Datuk (Datu) Amir Kahar bin Tun Haji Mustapha v. Tun Mohd Said bin Keruak & Ors* [1994] 3 MLJ 737 even constitutional conventions could not override the express provisions of the Sabah Constitution. It has been said consistently by jurists and writers that the "Constitution is the very framework of the body policy: its life and soul; it is the fountain-head of all its authority, the main spring of all its strength and power. The Executive, the Legislature, and the Judiciary are all its creation, and derive their sustenance from it ... While the Constitution is the direct mandate of the people themselves, the statute is an expression of the will of the Legislature only, though the Legislature is also the representative of the people. A Constitution is but a higher form of statutory law ... A written Constitution is to be interpreted and effect given to it as a paramount law to which all other laws must yield" (*Interpretation of Statutes* by N.S. Bindra.)

Raja Azlan Shah Ag. LP in *Dato Menteri Othman bin Baginda & Anor v. Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 at p. 32 in clear terms said:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way – "with less rigidity and more generosity than other Acts" ... As stated in the judgment of Lord Wilberforce in that case: "A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. ... It is quite consistent with this, ... that rules of interpretation ... **to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms** (emphasis supplied).

In *Public Prosecutor v. Koh Yoke Koon* [1988] 2 MLJ 301 at p. 302 Hashim Yeop A. Sani SCJ said:

> Detention not in accordance with law is inconsistent with the fundamental right guaranteed under article 5(1) of the Constitution.

The above is a brief approach and treatment of courts regarding any infringements of any constitutional right, with particular reference to matters affecting the fundamental liberties of a person. Let us now scrutinise the approaches of courts with regard to matters pertaining the interpretation of statutes which provide for detention and that which may clash with the fundamental liberties of a person.

It is the expectation of the law of this country that whenever any custodial order is pronounced, especially in cases of detention where no trial has been held, courts must constantly be alert and ensure that no lenient construction of the statute is practised. This is so as that detention is a deprivation of freedom and constitutes a serious transgression of the fundamental liberties of a citizen. Choor Singh J in *Daud bin Salleh v. The Superintendent, Sembawang Drug Rehabilitation Centre* [1981] 1 MLJ 191 at p. 193 said:

> The liberty of the subject is involved and legislation affecting a person's liberty must be strictly construed and strictly complied with. There must not be any relaxation of the vigilance of the court in seeing that the law is duly observed especially in a matter so fundamental as the liberty of the subject.

In the same tone Lee Hun Hoe CJ in *Datuk James Wong Kim Min; Minister Of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min* [1976] 2 MLJ 245 at p. 251 said:

> Preventive detention is, therefore, a serious invasion of personal liberty. Whatever safeguard that is provided by law against the improper exercise of such power must be zealously watched and enforced by the court. In a matter so fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty.

There are no hard and fast rules on how to succeed in an application of this nature ie, for a writ of *habeas corpus* although the ground of *mala fide* is not an uncommon one. This ground requires not only proof of the want of *bona fides,* on the part of the police or the relevant agency connected with the current case, but also require the proof of non-application of mind on the part of the detaining authority. In normal *habeas corpus* cases, where the Ministry of Home Affairs is a party, an applicant resorting to this ground is required to prove *mala fide* on the part of the police or the Minister and that the latter as the detaining authority had not applied his mind prior to making the detention order. Without doubt this format is highly laborious and may be difficult to be sustained by the applicant. The other ground also not uncommonly founded on, and which is recognised currently by law, is the assertion that that order of detention is invalid by virtue of the non-adherence of the procedures established by statutes. Suffice if I refer to the case of *Re Datuk James Wong Kim Min (supra)* where Lee Hun Hoe CJ Borneo at p. 251 said:

> Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith. Where personal liberty is concerned an applicant in applying for a writ of *habeas corpus* is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty.

In brief if a detention is held to be not in accordance with the procedures established by law an applicant may immediately apply for a writ of *habeas corpus* as he is entitled to be released forthwith. There is no necessity for him to pursue the line as suggested by the learned Federal Counsel which entails the involvement of prior obtaining of leave, lodgement of the application with the Attorney General's Chambers, postponements, lengthy hearings etc. (O. 53 of the Rules of the High Court 1980) merely to regain his personal freedom. No legal excuses may be entertained to delay that release or to burden the detainee with a lengthy and excrutiating trial for no fault of his, as to submit to this suggestion means condoning the delayed release and the sabotage of his right. This right is not discretionary (*Yeap Hock Seng @ Ah Seng v. Minister For Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279).

To understand the problem before me it is absolutely essential that I interpret and decipher the requirements of s. 6 of the Act. This section reads:

(1) Where a person who has undergone the tests referred to in section 3 or 4, and, in consequence of such tests, is certified by a government medical officer or a registered medical practitioner to be a drug dependent, the officer shall produce him, or cause him to appear, before a magistrate and if the magistrate, after giving such person an opportunity to make representations:

(a) is satisfied that such person requires to undergo treatment and rehabilitation at a Rehabilitation Centre, order such person to reside at such Centre for a period of two years to undergo treatment and rehabilitation and thereafter to undergo after-care in accordance with the provisions of this Act relating thereto; or

(b) is satisfied that such person's treatment and rehabilitation may be carried out otherwise than at a Rehabilitation Centre, he may order such person to be placed under the supervision of a Rehabilitation Officer for a period of not less than two and not more than three years, and to execute a bond with or without sureties, as the magistrate may determine, to remain under such supervision for such period:

Provided that where such person fails to execute such bond an order under paragraph (a) shall be made against him by the magistrate.

(2) An order of supervision under paragraph (b) of subsection (1) shall contain the condition requiring such person to abstain from dangerous drugs and may contain conditions as to residence, employment, associations, abstention from intoxicating liquor, or attendance at a Day Centre.

(3) The magistrate shall, before making an order either under paragraph (a) or (b) of subsection (1), consider a report by a Rehabilitation Officer on such person, a copy of which shall be supplied to such person, and which shall be read out and explained to him.

(4) In making an order under subsection (1), the magistrate shall have regard to the circumstances of the case, and the character, antecedents, age, health, education, employment, family and other circumstances of the person against whom the order is proposed to be made.

(5) A certificate under subsection (1) purporting to be signed by a government medical officer or a registered medical practitioner shall be receivable by a magistrate without proof of the signature thereon, and the magistrate shall accept it as proof of its contents, unless the contrary is proved.

A reading of this provision will indicate that an applicant after the arrest is required to undergo certain tests for purposes of ascertaining his status ie, whether he is a drug dependent or otherwise. Thereafter the registered medical officer (for purposes of our case too) will issue a certificate in the form of Borang 2 and the applicant will forthwith be produced before a magistrate. On that fateful day the learned magistrate must give the applicant the opportunity to make representations. That is the first step to be undertaken by the magistrate after scrutinising the certificate which is the springboard of the inquiry (sub-ss. (1) and (5) of s. 6 read together). The learned magistrate only has that certificate to guide him regarding the status of the applicant. Similarly the sufficiency of that certificate is dependent upon him. No doubt if that certificate certifies the applicant as being a person who is not a drug dependent then that is the end of the matter. In fact the applicant would not even be there in the first place.

The provision pertaining the evidential burden of the certificate is so relaxed that that document shall be receivable by the magistrate without proof of the signature. The contents unless sufficiently countered is credible evidence that must be considered by the learned magistrate. A legal poser which I find necessary to discuss insitu, is the timing as to when the applicant should challenge that certificate, namely whether after or before the issue of representations is resolved. Undoubtedly if it is so obvious from the face of the document that he is not a drug dependent, as said earlier, then the applicant is at liberty to speak out at that stage. Otherwise if on the face of that document it is certificated that he is *prima facie* a drug dependent the learned magistrate then is duty bound to accept the contents at face value. Only after the issue of representations has been resolved may it be administratively possible for the magistrate to deal with the protests, challenges, appeals and submissions of the applicant.

Having perused the Act I have to admit that I am unable to find any provision which has given an explanation or illustration to the terminology of "representations". Without doubt and subject to the canons of construction of statutes, in the context of this section, the term must be wide enough to include these rights namely to challenge, deny or reject whether by him personally, his solicitor, parents or representatives regarding:

1. the correctness of the tests which he underwent;
2. the truth of the certificate which was based on the tests purported to be signed by a medical officer or a registered practitioner;
3. the evidence pertaining to the circumstances of the case, character, antecedents, age, health, education, employment, family and other circumstances connected with the applicant;

4. the report prepared by a Rehabilitation Officer; and

5. finally to include the right to make submissions or appeals or put forward a case that is generally favourable to himself.

Mustapha Hussain J in *Hoo Thian Siong v. Public Prosecutor* [1988] 2 MLJ 401 when attempting to define the meaning of the relevant phrase in s. 6(1) of the Act in more compact terms said:

> The Act specifically enacted the words "giving such person an opportunity to make representations". Making representations is not the same as making appeals or pleas. Making representations here means the right to protest, which by necessary implication and reading it in the context of Article 5(3) of the Federal Constitution, is a right to challenge whatever is being brought against him.

Only after the hurdle of representations has been resolved may the magistrate proceed to begin with the inquiry. If the applicant is interested to make representations, and if the need arises eg, he requires the service of a solicitor, then the learned magistrate may in the circumstances of the case, be required to postpone the hearing so as to put into effect the rights of the applicant. On the other hand if the applicant is not interested then the matter ends there and the magistrate may proceed with the inquiry. On this latter issue, due to the sensitivities that may be involved as the applicant may be detained for a long stretch of time without trial, the learned magistrate should ensure that the applicant's rejection to make representations is sufficiently and clearly recorded.

With the issue of representations resolved then the learned magistrate may proceed with the inquiry. Prior to any pronouncement of any judicial decision, be it under sub-s. (1)(a) or (b) of s. 6, the learned magistrate must personally undergo a subjective test of being satisfied of that choice. In that process he cannot behave in an arbitrary or irrational state of being satisfied but must be thorough, sincere, and had applied his mind carefully based on certain considerations and facts (*Liversidge v. Sir John Anderson* [1942] AC 207 in particular p. 271; *Re v. Venkataraman* AIR (36) 1949 Madras 529; *Ratan Roy v. State Of Bihar* AIR (37) 1950 Patna 332). In support of the view that the test is of a subjective one, permit me to discuss the remarks of the court in *Re Jayantilal* AIR (36) [1949] 319 Bombay at p. 324 para. 10. The issue in question there related to an order of detention pursuant to s. 2 of the Bombay Public Security Measures Act. Under the said section, the Provincial Government or where the power is delegated to its subordinate officer who is satisfied that the person who is to be detained is acting in a manner

prejudicial to the public peace and the maintenance of public order, may issue an order of detention. Similar to the current case that subordinate officer involved in the issuance of that detention order was the District Magistrate of Ahmedabad. Baydekar J when discussing the word "satisfied" said:

> ... and whenever words like "satisfaction" or "it appears" have been used in an enactment or a regulation, the interpretation which has now been established is that the "satisfaction" is undoubtedly a condition precedent to the exercise of powers under the section. But all the same, what the courts have got to see, when subsequently an application is made challenging the existence of that satisfaction, is whether there was the subjective satisfaction of the authority which made the order and not whether there were grounds upon which a reasonable person could be satisfied that it was necessary to make the order ...

Further at p. 333 he said:

> I have already mentioned that the question of satisfaction of the District Magistrate is a question of fact, but still it is a subjective consideration and not an objective consideration, and whenever subsequently an order is challenged before a court, the court is only concerned with the question as to whether the District Magistrate was satisfied.

The factors of consideration enroute to the pronouncement of the order are inclusive of the elements provided for under sub-ss. (3), (4) and (5) of s. 6 of the Act. Under sub-s. (3) the learned magistrate must consider a report prepared by the Rehabilitation Officer on the applicant, a copy of which shall be supplied to the latter and which shall be read out and explained. The subsequent step to be undertaken after weathering the issue of the Rehabilitation Officer's report is that the learned magistrate has to consider the circumstances of the case, and the character, antecedents, age, health, education, family and other circumstances of the applicant (sub-s. (4)). What the sources are is unclear but the nature of the construction of the provision indicates that it would include information or contributions from the Rehabilitation Officer's report, the medical report, answers and pleas of the applicant and his parents and any information made available to the learned magistrate. Now the learned magistrate is ready to decide. Only after the magistrate is satisfied of his choice ie, to make any of the orders under s. 6(1) will he pronounce the order.

Let us peruse the facts of the present case in detail and thenceforth inter-twine them with my reasons to release the applicant. The applicant was taken into custody by the police for the purpose of undergoing certain tests ie, to determine whether he was a drug dependent within the definition of the Act. As the results could not be obtained within twenty four hours, an order was

obtained from the magistrate's court pursuant to s. 4(1)(b) of the Act whereby he was detained for a longer period to undergo and complete the abovesaid tests (exh. G encl. (3)). He was later produced before a magistrate on 2 October 1997 for purposes of obtaining an order which could be imposed on a drug dependent pursuant to s. 6(1)(a) or (b) of the Act.

As expected, the learned magistrate minuted the happenings of the enquiry as reflected in exh. E of encl. 3 albeit skimpily. I take the liberty of reproducing below the notes of proceeding in toto. They read:

Seksyen 6(1)Akta 283

Permohonan Dadah No: DD89-480-97

Tarikh: 2/10/98

Pegawai Penyiasat: Insp. Malkhan

B/C & B/S di dalam Bahasa Malaysia.

Penama Hadir.

Keluarga Penama:

Tatacara Persidangan diterangkan kepada Penama dan ditanya samada Penama memerlukan representasi perundangan.

J : Tidak

Pegawai Penyiasat kemukakan Lapuran Air Kencing dan ditanda sebagai P1.

Pegawai Pemulihan Dadah kemukakan Lapuran Pemulihan dan ditanda sebagai P2.

P2 - Dibaca dan diterangkan kepada Penama, dan diakui betul.

Rayuan Penama:

Pohon diberi jamin.

Pegawai Pemulihan Dadah:

Sprt. dlm. syor.

Pegawai Penyiasat:

Do

Keputusan Mahkamah:

P ditempatkan di Pusat slma 2 thn bwh s. 6(1) a APD

Alasan - pnghn serius
- tiada tggn

t. t.

MEJISTRET

I have reproduced the notes of proceeding and copied them exactly as I saw them. As can be seen by a cursory look much has been written by using shorthand/short form. In *R v. Payne & Spillane* [1971] 3 All ER 1146 where issues of shorthand notes were raised the court opined:

> It is the judge's duty to do everything practicable in the circumstances, if it is necessary to proceed without a shorthand writer or adequate mechanical recording, to ensure by means of his own note, and by requesting the co-operation of counsel for all parties concerned, that there is an adequate note which will, so far as is humanly possible, not be subject to dispute or challengeable on material matters.

As it is, the notes of proceeding in this case are challengeable by virtue of the shorthand which at certain places are unreadable, and may be capable of being misinterpreted. This comment is made in passing and consequently have not undergone serious consideration by me as the other available grounds were more than sufficient for me to grant the writ of *habeas corpus.* This *obiter dicta* is merely to alert magistrates to be doubly careful when recording any proceeding so as to avoid potential criticisms of their labour.

Pursuant to that inquiry the learned magistrate subsequently ordered the applicant be placed at the Rehabilatation Centre at Pusat Pemulihan Serenti Tampin Negeri Sembilan for two years. Being dissatisfied with the decision, the applicant as per encl. 1 of the notis usul, applied for a writ of *habeas corpus* on the basis that that order was tainted by illegality. On 10 April 1998 I heard the application and subsequently gave an order in terms to the notis usul.

Let us return to the facts and thenceforth as we go along I shall supply the reasons as to why I gave an order in terms for the application. First let us look into the issue of representations. Whether the applicant was accorded the opportunity to make representations, will require a perusal of the notes of the proceeding, which for convenience I have reproduced in toto above. The notes of proceeding which is marked exh. E per encl. (3) with regard to this specific issue records:

Tatacara Persidangan diterangkan kepada Penama dan ditanya samada Penama memerlukan representasi perundangan (loosely translated – the procedure of the hearing is explained to the applicant and asked whether he required any representations).

J: Tidak (loosely translated A : No.).

The questions that flooded my mind were whether the answers pertaining the above minutes with particular reference to the representations meant:

1. No, he did not want any representations;
2. No, the procedure of the hearing was not explained; or
3. he was not asked whether he required any representations.

In other words there were doubts as to the actual meaning of the answers in the minutes by virtue of them being written in a rather brief manner in the supplied space. Due to the meagre records, not only did it cause difficulty in reading them, but also gave rise to many probable interpretations. Here I found the first procedural defect and the initial flaw in the order.

Under sub-s. (3) the learned magistrate is mandatorily required to consider the report prepared by a Rehabilitation Officer. At this juncture a copy of that report shall be supplied to the applicant, and regardless of his educational background shall be read out, with the contents explained to him. With the applicant being aware of what is stacked for or against him, with or without a counsel or any representative, by virtue of that right of representations he may thenceforth challenge anything thrown at him and perhaps escape the more severe sentence or even escape completely all the charges.

The notes with regard to this issue merely read:

Pegawai Pemulihan Dadah kemukakan Lapuran Pemulihan dan ditanda sebagai P2.

P2 - Dibaca dan diterangkan kepada Penama, dan diakui betul.

(Loosely translated – Rehabilitation Officer submits Rehabilitation Report and marked as P2.

P2 - Read and explained to applicant, and acknowledged as correct).

Having perused the above records it is conspicuous that the notes are silent as to the supply of a copy of that report to the applicant inspite of the mandatory requirement that a copy shall be supplied to him. This is a finding of fact on my part and no amount of explanation whether by affidavit or otherwise can justify the absence of such a recording of not supplying that

document to the applicant. For matters of this nature the benefit of the doubt must lean in favour of the applicant. That being so, a second flaw is detected in the process adhered by the learned magistrate prior to the order being meted out.

The third flaw that I detected was with regard to the certificate itself. The notes of proceeding regarding this matter read as such:

> Pegawai Penyiasat kemukakan Lapuran Air Kencing dan di tanda sebagai P1.
>
> (Loosely translated – Investigating Officer submits Urine Report and marked as P1.)

By virtue of the fact that the applicant was produced before the learned magistrate it must mean that the relevant officer (as defined under s. 2) was satisfied as to the contents of that medical certificate. Going by the exhibits attached to the affidavits, a certificate entitled "Perakuan Tentang Penagihan Dadah" dated 27 August 1997 signed by one Dr. M. Swamenathan, was made available for my perusal. According to the notes of proceeding P1 reads "Lapuran Air Kencing" (Urine Report) whilst P1 as per the affidavit reads "Perakuan Tentang Penagihan Dadah" (Certificate of Drug Dependancy). Surely there is a world of a difference between a urine report and a certificate which is supposed to certify the position of the applicant. The question that cropped up in my mind was whether a certificate regarding the status of the applicant based on the urine report was not submitted in court for the perusal of the learned magistrate but instead substituted by a urine report? The law requires that a certificate be tendered and not the report.

Again this third flaw must lean in favour of the applicant.

Additional to the above three flaws, the notes of proceeding which is a treasure trove of revelation of the weaknesses of the learned magistrate, whilst carrying out her judicial duty, are these additional procedural defects which I managed to detect, especially:

1. her unwillingness to adjust accordingly and correct the ready format when the need arose. In *Mahmod bin Jaudin v. Penguasa Pusat Serenti Sungai Besi Selangor & 2 Ors* [1996] 3 AMR 2920 I commented favourably with regard to the act of the learned magistrate inspite of the ready format as he had done the needful reasonably well. That case therefore is distinguishable to the current one;

2. whether the applicant's parents were not present, not allowed to be present or whether the learned magistrate was oblivious of the parental factor are uncertain by virtue of the manner the notes were recorded; and

3. the absence of minutes whether:

(i) she was "satisfied" as required by s. 6(1)(a) and (b);

(ii) she did consider the report of the Rehabilitation Officer; and

(iii) she did have regard to the factors laid down under s. 6(4) of the relevant Act.

Clearly by the absence of the above five relevant issues apart from the earlier three procedural and evidential flaws detected in the notes of proceeding, a negative interpretation must be drawn, in that the learned magistrate had missed out all those legal requirements. This interpretation may be arrived at, as this is not a "speaking notes of proceeding" (the term "speaking" normally applies for judgments), and is incapable of convincing any reader that the legal niceties have been stringently adhered to. Any absence of records pertaining the relevant and mandatory matters, may be construed in favour of the applicant in that an inference may be drawn that these matters were not considered by her. Wan Yahya J in *Hari Ram Seghal v. Public Prosecutor* [1981] 1 MLJ 165 at p. 168 had occasion to say:

> The persons appearing in our courts have the right to expect the best quality of justice and nothing less. Any mistake or flaw in that machinery, which may have the possibility of injustice, must be resolved in their favour.

Chong Siew Fai J (as he then was) in *Re: Hj Sazali bin Datuk Haji Noor Tahir* [1992] 3 CLJ 1753/1755 para C (left) pointedly said:

> The absence of any recording that they had been considered indicates the possibility that the matters may not have influenced the mental process of the presiding magistrate in arriving at his ultimate decision.

A rather unnerving piece of evidence placed before me was the production of an affidavit affirmed by the learned magistrate explaining and justifying her relevant acts during the hearing. I use the word "unnerving" as I was being confronted by a sworn statement of a magistrate who had put her integrity on the firing line when she attempted to justify and prop up her actions when carrying out her judicial duties. If I were to allow the *habeas corpus* application, it could be construed that I reject a sworn statement of an officer of the court, whilst the reverse would mean accepting the contents of the affidavit which were not reflected in the notes of proceeding. Either way her involvement had put me in an embarrassing and awkward position. One must bear in mind too that that act of hers was equivalent to "jumping into the affray" and getting embroiled with the issues at hand thus giving an impression of being partisan to the executive action of the relevant ministry. Regarding

this issue, it would therefore not be inappropriate to cite an excerpt from *Magistrates' Court Handbook*, p. 39 which reads:

> Even though it is difficult to achieve, the magistrate should avoid giving any impression that he is beholden or influenced by any authority or grouping and a magistrate should remain alert to the possibility that if he becomes partisan in any public cause his judicial independence or public confidence in the Magistracy may be undermined.

Delving into this matter further, permit me to reproduce the relevant provision with regard to the statutory protection afforded to magistrates when carrying out their judicial duties. Allow me, to reproduce s. 14 of the Courts of Judicature Act which reads:

> (1) No judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.
>
> (2) No officer of any court or other person bound to execute the lawful warrants or orders of any Judge or other person acting judicially shall be liable to be sued in any civil court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same.

Under this provision judges and judicial officers are sufficiently protected whenever they are acting judicially in that they are not to be held liable or sued in any civil court for any act done or ordered to be done by him in the discharge of their judicial duties. In the case of *Ho Kok Thin & Ors v. The Sheriff/Registrar Of The High Court Borneo & Anor* [1989] 3 MLJ 181 where the Registrar of the High Court had the power to abort the sale by auction, it was held that so long as she had that power and had invoked it, rightly or wrongly it followed that she could rightfully claim the protection of immunity under the above section. In *Royal Aquarium And Summer And Winter Garden Society, Limited v. Parkinson* [1892] 1 QB 431 it was held that the justices could only be entitled to immunity only in so far as he acts judicially and not for the exercise of any administrative discretion. In *Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v. Tan Beng Sooi* [1997] 2 MLJ 118 the Senior Assistant Registrar by virtue of her not carrying out a judicial act when issuing the relevant circular was held to be beyond the protection of s. 14 of the Courts of Judicature Act 1964. Therefore the proceedings against the officer was in order. This brief dissectation is with regard to suits against an officer of the court whilst carrying out judicial duties.

As regards judicial officers being required to answer questions, as to their own conduct at trials in which they have decided, the current view is that only in exceptional circumstances may they be ordered to do so. The relevant provision concerning this issue is under s. 121 of the Evidence Act. This section reads:

> No Judge and, except upon the special order of the High Court, no President of a Sessions Court or Magistrate shall be compelled to answer any questions as to his own conduct in court as Judge, President or Magistrate or as to anything which came to his knowledge in court as a Judge, President or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Edgar Joseph Jr. in *Pavone v. Public Prosecutor* [1986] 1 MLJ 72 at p. 75 had this to say:

> Section 121 of the Act is based on general grounds of convenience and public policy. Obviously, it would cause great inconvenience and perhaps, embarrassment, if Magistrates or Presidents are withdrawn from their own Courts to answer questions as to their own conduct at trials at which they have presided. It follows that it is only in altogether exceptional circumstances that a Special Order will be made under the section and that too only when it appears essential to the just decision of a case.

At the risk of repeating it is a fact that the relevant issue as contained in the affidavit is:

(i) within the jurisdiction of the magistrate;

(ii) pursuant to a judicial act;

(iii) not of an administrative nature;

(iv) not pursuant to an order required by the High Court;

(v) in contention before the High Court of which is the focal point of argument; and

(vi) inappropriate in the circumstances of the case.

Due to the above reasons the learned magistrate should have been more sensitive to her judicial position rather than the request of the relevant Ministry which is one of the contesting parties. That affidavit was a blatant attempt on her part to justify the weaknesses of her judicial act as reflected in the notes of proceeding. Apart from giving an impression of being partisan to one of the parties the learned magistrate was totally insensitive to my predicament as a High Court Judge who was then deliberating on the matter at hand. To

round up on the matter of the affidavit, it was quite ill-advised of her to be a party to matters at hand, especially when the fundamental liberties of a person was at stake. Magistrates therefore should be dissuaded from affirming affidavits merely for the sake of explaining away the flaws detectable in their notes of proceeding. Let the records do the talking.

To conclude, I therefore had no hesitation in issuing a writ of *habeas corpus* in the circumstances of the case by virtue of the abundance of procedural defects detected in the notes of proceeding.